Supreme Court, U.S.
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No. 98-764

In The

Supreme Court of the United States

October Term, 1998

MORTON COMMUNITY UNIT SCHOOL DISTRICT NO. 709,

Petitioner,

v.

J.M., a minor; M.M. and S.M., Individually and as parents and next friends of J.M. and the ILLINOIS STATE BOARD OF EDUCATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTION PRESENTED

The question presented in this case is:

Whether tracheotomy and other services needed by a special education student, in order to attend school, which can be provided by a non-physician and do not constitute an undue burden upon the school district, financially or otherwise, constitute a "related service" and not a "medical service" under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401(a)(17) (West 1996)[1]

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[1] When this litigation began in July, 1996, the 1997 IDEA Amendments had not yet been enacted. The citations to the IDEA throughout this brief are to the pre-1997 amended statute.

TABLE OF CONTENTS

Page

Response to Petitioner's Question Presented i

Table of Authorities iii

Statement of the Case 1

A. Nature of the Case and Procedural Background 1

B. Statement of Facts 5

Reasons for Denying Writ 8

I. Petitioner has failed to establish a basis for Certiorari because the decision below does not present an issue of great importance, or on the evidence present, a conflict between the circuits 8

II. There is no reason to hold this petition pending a decision in *Cedar Rapids Community School District v. Garret F.*, because even if this Court rejects a "bright-line" test for determining whether a health service is an excluded "medical service" under the IDEA, the Respondent would prevail because the Court below held that there would be no undue burden imposed by providing the services 11

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES CITED

Cedar Rapids Community School District v. Garret F., 106 F.3d 822 (8th Cir.1997), *cert. granted*, 118 S. Ct. 1793 (U.S. May 18, 1998) 4, 5, 10, 11, 12

Detsel v. Board of Education of Auburn Enlarged City School District, 820 F.2d 587 (2nd Cir. 1987) (per curiam), *cert. denied*, 484 U.S. 981 (1987) 5, 10, 11

Fulginiti v. Roxbury Township Public Schools, 921 F. Supp. 1320 (D.N.J. 1996), aff'd, 116 F.3d 468 (3rd Cir. 1997) 5, 10, 11

Irving Independent School District v. Tatro, 468 U.S. 883 (1984) 1, 4, 9, 11

Neely v. Rutherford County School District, 68 F.3d 965 (6th Cir. 1995) 5, 10, 11

STATUTES CITED

20 U.S.C. § 1400 *et seq.* 2

20 U.S.C. § 1400(c) 2

20 U.S.C. § 1401(a)(17) 2

RULES CITED

34 C.F.R. § 300.16(a) 2, 3

34 C.F.R. § 300.16(b)(11) 3

34 C.F.R. § 300.16(b)(4) 3

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND PROCEDURAL BACKGROUND

The Petitioner Morton Community Unit School District No. 709 ("the School District" or "Morton") seeks review in this Court of the Seventh Circuit's decision affirming the District Court's decision, which held that the Respondent J.M. is entitled to the health services he needed to attend school, which included care of his tracheotomy. The court held that these were "related services" under the IDEA and thus that Morton must identify and contract with a qualified individual to provide services to J.M. The Seventh Circuit concluded that the health services needed by J.M. did not impose an undue burden on Morton, in part because Morton had admitted the services posed no financial burden on the School District. The court below neither accepted nor rejected the bright-line test for determining whether a health service is an excluded "medical service" under the IDEA that some courts have held is mandated by this Court's decision in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984). Nevertheless, the court below held that the services that J.M. needed to attend school, are "related services" under the IDEA. (Pet. App. at 11a).[2] The court reasoned that despite the protests by the School District that it has insufficient school nursing staff, the services did not constitute an undue burden on the district.

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[2] Cites to "Pet. App." refer to the appendix filed with the Petition to this Court. Cites to "App." refer to the Appendix filed in the Seventh Circuit Court of Appeals.

This case is governed by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and the applicable regulations at 34 C.F.R. § 300.16(b)(11). Under the IDEA eligible students are entitled to:

> a free appropriate public education that emphasizes special education and *related services* designed to meet their unique needs and prepare them for employment and independent living. (emphasis supplied)

20 U.S.C. § 1400(c) (West, 1996)

The term "related services" means:

> transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, *and medical services, except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. (emphasis supplied)

20 U.S.C. § 1401(a)(17) (West, 1996)

"Related services" are described in the Code of Federal Regulations interpreting the IDEA at 34 C.F.R. § 300.16(a):

> (a) As used in this part, the term "related services means transportation and such developmental, corrective and such developmental,

> corrective and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. *The term also includes school health services,* social work services in schools, and parent counseling and training. (emphasis supplied)

34 C.F.R. § 300.16(a)

School health services and medical services are further defined by regulation:

> School health services means services provided by a *qualified school nurse or other qualified person.* (emphasis supplied)

34 C.F.R. § 300.16(b)(11)

> "Medical Services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

34 C.F.R. § 300.16(b)(4)

Prior to the School District's complaint filed in U.S. District Court against J.M. and his parents, two successive administrative hearing officers appointed by the Illinois State Board of Education entered decisions and orders in favor of J.M. The orders of September 23, 1996 (the Level I Hearing) and January 23, 1997 (the Level II Review), determined that J.M.'s requested services were

"related services" under the IDEA. Morton was ordered to identify and contract with a qualified person to provide these services to J.M. Since the inception of the first due process hearing in July 1996, Morton has refused to provide the requested services, and it continues to withhold from J.M. the related services held on July 27, 1998 to be legitimate under the IDEA by the Seventh Circuit Court of Appeals.

This Court currently has under advisement a case that presents the question whether a bright-line, physician/non-physician, test for determining whether a health service is an excluded medical service is required by this Court's earlier decision in *Tatro*. *See, Cedar Rapids Community School District v. Garret F.*, 106 F.3d 822 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 1793 (U.S. May 18, 1998). In *Cedar Rapids*, the student's health services were found to be "related services" under the IDEA by a state level hearing officer through an analysis of the principles announced in *Tatro*. That decision was reviewed and affirmed by a U.S. District Court and the Eighth Circuit Court of Appeals which held that if a service may be performed by someone other than a physician it is not medical. In *Cedar Rapids* the school district did not contend, and the Eighth Circuit did not address, whether the school nursing services requested constituted an "undue burden," financial or otherwise, to the school. In opposing a writ, J.M. contends that, because the Seventh Circuit held that Petitioner Morton would not be burdened, financially or otherwise, by providing the requested services, it decided this case on grounds not inconsistent with the holdings upon which the conflict supporting a grant of certiorari in *Cedar Rapids* was premised, i.e., the

decisions in the Second, Third and Sixth Circuit Courts of Appeal.[3] Respondent J.M. further contends that holding this case for disposition after resolution of the conflict to be resolved in *Cedar Rapids* would not serve the ends of justice, as the outcome would not likely be affected by that decision and delay would cause further harm to him. Petitioner has therefore failed to demonstrate sufficient grounds for certiorari.

B. STATEMENT OF FACTS

J.M. is a fifteen year old boy who lives with his parents in Morton, Illinois, a community in Central Illinois, where he currently attends Morton High School. (App. 65). J.M. moved to the Morton District in 1996 after spending five productive years as a special education student at the Marycrest School in Joliet, Illinois where he was placed by his prior district of residence, the Lisbon Community School District ("Lisbon"), in Kendall County, Illinois. (App. 67). J.M., a student with disabilities, benefits educationally and psychologically from school. (App. 3a). His educational and social progress between 1991 to 1996 is well documented in the record. (App. 67). In order to be in school, J.M. requires assistance from a nurse or other qualified person. He has breathing problems due to chronic fibrotic lung disease, requiring assistance for suctioning of his tracheotomy

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[3] *Detsel v. Board of Education of Auburn Enlarged City School District* 820 F.2d 587 (2nd Cir. 1987); *Fulginiti v. Roxbury Township Public Schools*, 921 F. Supp. 1320 (D.N.J. 1996), aff'd, 116 F.3d 468 (3rd Cir. 1997); and *Neely v. Rutherford County School District*, 68 F.3d 965 (6th Cir. 1995).

and he has corneal abrasions which require hourly eye medication. (App. 66-69). He uses a wheelchair, but he also walks with a walker, vocalizes around his tracheotomy, and is able to feed himself at home and at school. (App. 67-68).

From 1991 to 1996 in his previous home district, J.M. received a range of special education "related services", including physical, occupational and speech therapy, as well as the respiratory and other assistance sought in this action. J.M.'s home district, Lisbon, contracted with a nurse who provided individual supportive services to J.M. at school during a 16 hour school week and during transportation to and from school. (App. 69-70). J.M.'s portable ventilator system (an oxygen trach collar) allowed him to participate in class and maintain respiratory functioning at school. (App. 68). The nurse assisted J.M. at school with procedures that required a total of ten to fifteen minutes, including suctioning of the tracheotomy, administration of eye medication and bathroom transfers. Except for the eye medication, which was administered hourly, these were repeated every two hours. The nurse visually monitored J.M. throughout the four hour school day, but J.M.'s procedures never interrupted class instruction, and, over time, the monitoring became increasingly less intrusive, allowing J.M. to become more and more independent. (App. 70).

When J.M. and his parents moved within Illinois from Lisbon to the Morton District in May, 1996, as a result of an employment transfer, the parents immediately sought to enroll J.M. in school, and they requested the same Individualized Education Plan (IEP), with the

same services that he had consistently received from Lisbon for five years. (App. 66). Morton refused to provide the services of a nurse or any other qualified person to provide the individualized services that J.M. needed to attend school. (App. 63). J.M. and his parents requested a due process hearing in July, 1996 to determine J.M.'s rights under the IDEA. Because J.M. could not attend school without these supportive services, he spent the entire 1996-97 school year in a homebound program with a tutor provided by the school.

J.M. and Morton participated in two levels of administrative review in 1996. The hearing officers in each held the evidence showed that J.M. needed individualized health services in order to attend school, including assessment of his respiratory status with appropriate interventions, administration of hourly eye lubricant, administration of nebulized breathing treatments, monitoring of equipment and other assistance as needed. (App. 69). Each level concluded, as well, that the services required were not excluded medical services, but were health services required to be provided by the School District.

The evidence at the Level I hearing showed that a lay person could be trained to provide the services, and that J.M.'s parents (a school teacher and a computer analyst) learned the procedures in one week of half-day training, and that J.M. did not require a physician's services. (App. 68). After consulting with only one agency, the school district estimated the cost of J.M.'s services at approximately $20,000 per academic year, and its representative testified that providing the services did not impose a financial burden to the School District. (App. 70). Morton

offered no evidence showing that contracting with a trained individual to provide the service was beyond the competence of the Morton District. The evidence at the hearings further established that the requested services did not address either treatment or cure for J.M.'s health conditions, but are maintenance procedures designed to maintain the status quo throughout the day so that he can attend school. (App. 68-69).

J.M. has been seeking the services that are at issue in this case since mid-1996. Despite obtaining two administrative orders and two court decisions in his favor, the services have not been provided by Morton. It is J.M. who has paid for the delay, first by doing without services at all, and subsequently by providing them himself.

REASONS FOR DENYING WRIT

I.

PETITIONER HAS FAILED TO ESTABLISH A BASIS FOR CERTIORARI BECAUSE THE DECISION BELOW DOES NOT PRESENT AN ISSUE OF GREAT IMPORTANCE, OR ON THE EVIDENCE PRESENT, A CONFLICT BETWEEN THE CIRCUITS.

Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 further sets forth those circumstances under which certiorari may be proper, i.e., when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." (Rule 10(a)) or when "a United States court of appeals has decided an

important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Rule 10(c)).

The Petitioner has failed to sufficiently identify the conflict in the interpretation of the IDEA in the decision in the case below as contrasted with the decisions in other circuit courts of appeal as required under Rule 10, and the case below does not warrant certiorari because it does not present a direct conflict of authority among the circuits. Nor does it of its own accord present a question of great importance. Although the outcome of the case below is different from the results in *Detsel, Fulginiti* and *Neely,* the decision below is clearly consistent with the reasoning of those cases; it did not depend upon the bright-line test that those decisions rejected. (App. 2a).

The Seventh Circuit decided this case in J.M.'s favor by agreeing that his health services were in fact "related services" under the IDEA because 1) the cost of providing the services was not an undue burden to the School District; 2) the approach used by both hearing officers who decided this issue was consistent with the decision in *Tatro;* and 3) the decisions by both hearing officers to order Morton to provide the services were reasonable, because although "time consuming," the health services required by J.M. did not "cross the line" to become "medical services" as defined by the IDEA and its regulations. (Pet. App. 11a).

The court reviewed at length the School District's argument against providing the services, which amounted to one of undue burden, but could find no evidentiary

basis for the School District to maintain such an argument. (Pet. App. 7a-8a). Writing for the court in the opinion below, Judge Posner observed that Morton made "no effort to show that the expense of a full time nurse for J.M. would be undue in relation to the other calls on the district's budget." (Pet. App. 7a). Such a clear, unambiguous concession that no financial barrier or burden prevented Morton from providing a student services he needed to be in school does not appear in the cases with which Petitioner requests this Court to recognize a conflict. Thus, based on the legal authority cited by the Petitioner, *Detsel*, *Fulginiti* and *Neely*, there is no direct conflict among the circuits which would warrant certiorari.

In sum, although J.M. argued in the Seventh Circuit that the Court of Appeals should adopt the physician/non-physician rule that he contended was required by *Tatro*, the panel found less sweeping reasons for affirming that J.M.'s services were "related services" under the IDEA, as determined by the District Court. (Pet. App. 43a). This precluded the conflict that would have arisen had the Court of Appeals adopted the *Cedar Rapids* rationale for the result it reached. Accordingly, this Court should deny the Petition because the Seventh Circuit's decision is not in conflict with the decisions of any of the other circuits cited by Petitioner.

II.

THERE IS NO REASON TO HOLD THIS PETITION PENDING A DECISION IN *CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT v. GARRET F.*, BECAUSE EVEN IF THIS COURT REJECTS A "BRIGHT-LINE" TEST FOR DETERMINING WHETHER A HEALTH SERVICE IS AN EXCLUDED "MEDICAL SERVICE" UNDER THE IDEA, THE RESPONDENT WOULD PREVAIL BECAUSE THE COURT BELOW HELD THAT THERE WOULD BE NO UNDUE BURDEN IMPOSED BY PROVIDING THE SERVICES.

This Court should deny the Petition outright, and not hold for resolution of the *Cedar Rapids* case. (Pet. App. 7a). Regardless of whether this Court in *Cedar Rapids* interprets the IDEA and its regulations to require otherwise qualifying health related services to be provided whenever they do not require the services of a physician (i.e., the bright-line test), the case below was correctly decided, and no further review is warranted. Respondent would thus prevail because the costs and responsibilities to the Morton District do not unduly burden the School District in this case. The *Fulginiti*, *Neely* and *Detsel* decisions illustrate. The District Court in *Fulginiti* found, and the Third Circuit affirmed without written opinion, that the costs for the student's nursing care at school amounted to an undue burden. 921 F. Supp. at 1325. Similarly, the Sixth Circuit in *Neely* explained that the services themselves were an "undue burden". 68 F.3d at 971. Finally, in *Detsel*, the Second Circuit affirmed a District Court finding that the "medical attention" required by the student was "beyond the competence of a school nurse." 637 F. Supp. 1022, 1026 (N.D.N.Y 1986), *aff'd per curiam*, 820 F.2d 587 (2nd Cir. 1987). Here, there was no

such finding of undue burden by the state hearing officer; indeed both Illinois State Board of Education hearing officers found in this case that J.M.'s tracheotomy care services as well as other one on one assistance commonly provided by schools (for bathroom transfers and other individual assistance necessary during the school day) were "related services" under the IDEA. The Seventh Circuit gave appropriate deference to those decisions.

Morton's clear concession that the services required by J.M. in school were not a financial burden calls for a conclusion that, whether or not this Court affirms the *Cedar Rapids* bright-line test, the decision below in the Seventh Circuit is not an appropriate case for a writ. Moreover, the granting or holding of the Petition would serve only to further postpone the provision of services by the Morton School District, services needed by J.M. to attend and benefit from school.

CONCLUSION

For each of the reasons set forth in the Respondent's brief, this Court should deny the Morton Community School District's Petition for Writ of Certiorari.

Respectfully Submitted,

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